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CLERK OF THE SUPREME COURT
STATE OF WASHINGTON

No. 84369-4

SUPREME COURT OF THE STATE OF WASHINGTON

JACK and DELAPHINE FEIL, husband and wife; JOHN TONZ and
WANDA TONZ, husband and wife; and THE RIGHT TO FARM
ASSOCIATION OF BAKER FLATS,

Appellants,

v.

(No. 82399-5)

THE EASTERN WASHINGTON GROWTH MANAGEMENT
HEARINGS BOARD, DOUGLAS COUNTY, WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION, WASHINGTON STATE
PARKS AND RECREATION COMMISSION, and PUBLIC UTILITY
DISTRICT NO. 1 OF CHELAN COUNTY,

and

(No. 82400-2)

DOUGLAS COUNTY, DOUGLAS COUNTY BOARD OF COUNTY
COMMISSIONERS, WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, WASHINGTON STATE PARKS AND
RECREATION COMMISSION, and PUBLIC UTILITY DISTRICT
NO. 1 OF CHELAN COUNTY,

Respondents.

**ANSWER TO MEMORANDUM OF AMICI CURIAE
ON PETITION FOR REVIEW**

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Statutes

RCW Chapter 36.70A Growth Management Act (GMA)	Passim
RCW Chapter 36.70B Land Use Petition Act (LUPA)	Passim

Respondent Douglas County hereby answers the Memorandum of Amici Curiae supporting the Petition for Review.

I. AMICI CURIAE LACK AN UNDERSTANDING OF THE FACTS AND PROCEDURAL HISTORY

The Memorandum filed by amici curiae, Pacific Legal Foundation, et al., demonstrates a fundamental lack of understanding of the facts and procedural history of this case.

The Rocky Reach Trail is a Transportation Project

Throughout their Memorandum, amici curiae characterize the Rocky Reach Trail as a *recreational* trail, *recreational* use, or *recreational* facility. The proposed Rocky Reach Trail is a non-motorized transportation project. The project is located on Washington State Department of Transportation (WSDOT) highway right-of-way and on Public Utility District No. 1 of Chelan County (Chelan County PUD) land adjacent to Lincoln Rock State Park. The Rocky Reach Trail will provide a safe alternative route for pedestrians and bicyclists who use State Route 2/97. It will also provide opportunities for shoreline recreation and, for that reason, a Recreational Overlay Permit was sought and issued. AR, CD Vol. 2, Bates Stamp 1-7 (Land Development Permit Application).

*The County's Comprehensive Plan and
Development Regulations Were Followed*

Amici curiae state, "The County's decision to convert agricultural lands to recreational uses was not authorized by its subarea plan." Amici curiae further claim, "[T]he County circumvented its own prohibition against converting agricultural lands by issuing a permit." Memorandum, pp. 2-3. To the contrary, the Rocky Reach Trail is specifically authorized by the County's comprehensive plan.¹ The County reviewed the permit under existing development regulations, DCC Chapter 18.46. See, Respondent's Brief by Douglas County, pp. 17-30.²

The County's Development Regulations Were Not Amended

Amici curiae further state, "The County's resolution amended its development regulations to allow for the conflicting use of agricultural lands." Memorandum, p. 3. There is no evidence of

¹ Shoreline Design Access Plan, pp. 16-18; Greater East Wenatchee Area Comprehensive Plan, Section 5-3. The goals and policies of the Shoreline Management Act and the County's Shoreline Master Program are an element of the County's comprehensive plan. RCW 36.70A.480(1).

² The Respondent's Brief before the Court of Appeals included excerpts from State and County planning documents, as well as County plans and ordinances, all of which were before the GMHB by being set out in the County's Respondent's Memorandum submitted on the Motion to Dismiss. Pursuant to WAC 242-02-660, the GMHB takes official notice of State actions and the County's plans, ordinances and resolutions. The excerpted plans and ordinances were part of the record before the GMHB and the superior court. Respondent's Memorandum, pp. 9-16; 82399-5, Vol. II, CP 339.

any amendment to the County's development regulations. All underlying zoning for the land crossed by the Rocky Reach Trail, which includes residential, commercial and agricultural zones, remains unchanged. AR, CD Vol. 2, Bates Stamp 6-7 (Land Development Permit Application).

Potential Impacts to Agriculture Have Been Properly Mitigated

Amici curiae claim the County's permit approvals for the Rocky Reach Trail result in "limiting agricultural uses and practices both on and in proximity to the trail." Memorandum, p.4. The Shorelines Hearing Board and the Superior Court have held that the conditions imposed upon the Rocky Reach Trail adequately address and mitigate potential impacts to agriculture. *McNeal, et al. vs. Douglas County, et al.*, Shorelines Hearing Board, No. 04-002 (March 4, 2005); *McNeal, et al., vs. Douglas County, et al.*, Douglas County Superior Court, No. 04-2-00045-6 (September 13, 2005); *Feil, et al. vs. State of Washington, et al.*, Douglas County Superior Court, No. 05-2-00121-3 (September 13, 2005). These prior decisions relating to the Rocky Reach Trail are final and deadlines to seek appeal or review expired several years ago. 82400-2, CP 6520, 6555, Vol. 34, CD Copy of Record, Litigation

Chronology and Exhibits, Bates stamp, 1939-1967, 4827-4855, 4862-4864.

Additionally, the Orchardists did not raise any issues in their Petition for Review regarding a failure to mitigate potential impacts to agriculture. See, *Satomi Owners Ass'n v. Satomi, LLC*, 167 Wn.2d 781, 819, 225 P.3d 213 (2009) (the Court will generally decline to consider issues raised solely by amicus curiae); RAP 13.7(b) (scope of review limited to issues raised in the petition for review or the answer thereto).

The facts and procedural history cited by amici curiae should be disregarded by this Court.

II. AMICI CURIAE SEEK A LEGISLATIVE CHANGE TO WASHINGTON LAND USE LAW

Amici curiae seek a fundamental change in Washington land use law. Amici curiae urge this Court to strictly enforce the "mandates" of the Growth Management Act, RCW Chapter 36.70A, by broadening the ability to challenge local permitting decisions and providing remedies beyond the limitations in the Growth Management Act and the Land Use Petition Act, RCW Chapter 36.70C.

Amici curiae impliedly ask this Court to ignore or overturn its decisions in *Thurston County v. Western Washington Growth Management Hearings Board*, 164 Wn.2d 329, 345, 190 P.3d 38 (2008) (County comprehensive plan is conclusively presumed valid if not challenged within 60 days after publication); *Woods v. Kittitas County*, 162 Wn.2d 597, 616, 174 P.3d 25 (2007) (LUPA challenge to a site specific land use decision limited to violations of the comprehensive plan and/or development regulations, and violation of the GMA is not subject to review); and *Wenatchee Sportsmen Association v. Chelan County*, 141 Wn.2d 169, 4 P.3d 123 (2000) (LUPA challenge to permit based on development regulations not subject to GMA review and is limited to conformance with development regulations).

Amici curiae advocate review by the Supreme Court “to assure that local government is adhering to mandatory statewide land use policy regarding agricultural lands.” Memorandum, p. 8. Amici curiae urge that the project permits issued for the Rocky Reach Trail should, therefore, be subjected to GMA review by this Court.

The Supreme Court has previously declined to expand the remedies available under the Growth Management Act. In *Skagit*

Surveyors and Engineers, LLC, v. Friends of Skagit County, 135

Wn.2d 542, 567, 958 P.2d 962 (1998), the Supreme Court held:

Whether it would be beneficial, useful or reasonable for a growth management hearings board to have the power to invalidate pre-Act ordinances is not at issue, only the statutory authorization of that power. Even if we agreed with 1000 Friends that public policy would be better served if the board were granted stronger remedial powers, we are not in a position to create those powers. Our role is to interpret the statute as enacted by the Legislature, after the Legislature's determination of what remedy best serves the public interest of this state; we will not rewrite the statute. (Citations omitted)

The Supreme Court has also declined to liberally construe the requirements of the Growth Management Act:

[I]t should be noted that from the beginning the GMA was "riddled with politically necessary omissions, internal inconsistencies, and vague language." The "GMA was spawned by controversy, not consensus" and, as a result, it is not to be liberally construed. (Citations omitted)

Thurston County v. Western Washington Growth Management Hearings Board, *supra*, at 342.

The Orchardists' untimely GMA challenge to the Rocky Reach Trail permits was contemplated and discussed by this Court in *Woods v. Kittitas County*, *supra*, at 614:

Assuming that a project permit must be consistent with development regulations or a comprehensive plan, there is the potential that the actual regulations or plan are not consistent with the GMA. As noted above, a comprehensive plan or development regulation's compliance with the GMA

must be challenged within 60 days after publication. RCW 36.70A.290(2). Once adopted, comprehensive plans and development regulations are presumed valid. RCW 36.70A.320(1). Thus, if a project permit is consistent with a development regulation that was not initially challenged, there is the potential that both the permit and the regulation are inconsistent with the GMA. While this is problematic, the GMA does not explicitly apply to such project permits and the GMA is not to be liberally construed. *Skagit Surveyors*, 135 Wash.2d at 565, 958 P.2d 962. This court's "role is to interpret the statute as enacted by the Legislature ... we will not rewrite the [GMA]." *Id.* at 567, 958 P.2d 962. Because the GMA does not provide for it, we hold that a site-specific rezone cannot be challenged for compliance with the GMA.

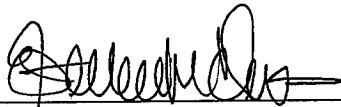
The Legislature has held three regular sessions since this Court's decision in *Woods v. Kittitas County*. No action was taken by the Legislature to broaden enforcement of the Growth Management Act or expand the ability to challenge project permits.

III. CONCLUSION

This Court should not, as urged by the amici curiae, accept review of this case and rewrite the Growth Management Act and the Land Use Petition Act.

Dated: June 11, 2010

Respectfully submitted,



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